UNITED
NATIONS

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Economic and Social
Council

Distr.
GENERAL

E/CN.4/Sub.2/1991/7
25 July 1991

Original: ENGLISH

COMMISSION ON HUMAN RIGHTS

Sub-Commission on Prevention
of Discrimination and
Protection of Minorities
Forty-third session
Item 4 of the provisional agenda

REVIEW OF FURTHER DEVELOPMENTS IN FIELDS WITH WHICH THE SUB-COMMISSION HAS BEEN CONCERNED

Study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms

Progress report submitted by Mr. Theo van Boven, Special Rapporteur

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Introduction

1. In its resolution 1990/6 of 30 August 1990, the Sub-Commission on Prevention of Discrimination and Protection of Minorities, recalling its resolution 1989/13 by which it entrusted Mr. Theo van Boven with the task of undertaking a study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms, took note with appreciation of the preliminary report, including the tentative outline annexed thereto, submitted by the Special Rapporteur in accordance with his mandate (E/CN.4/Sub.2/1990/10). In the same resolution 1990/6 the Sub-Commission requested the Special Rapporteur to prepare for the forty-third session of the Sub-Commission a progress report on the subject matter, taking into account comments made in the discussion on the preliminary report, including the provisional plan for the study, at its forty-second session. The Special Rapporteur was also requested to take into account the relevant work and recommendations of the Committee on Crime Prevention and Control and whatever decisions which might be adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, and for this purpose to undertake the necessary consultations with the United Nations Centre for Social Development and Humanitarian Affairs.

2. The present progress report consists of three sections. The first section deals with issues relating to the scope of the study, taking into account comments made in the discussion on the preliminary report at the forty-second session of the Sub-Commission. The second section reports on relevant decisions adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders. The third section deals with relevant decisions and views of international human rights organs. This third section cannot be considered as a complete overview of the subject matter. More work has to be done, in particular with regard to international human rights organs not covered by the present progress report. It should further be understood that this progress report does not supersede the preliminary report but that it should be read in conjunction with the preliminary report.

I. ISSUES RELATING TO THE SCOPE OF THE STUDY

3. The discussion of the preliminary report at the forty-second session of the Sub-Commission gave rise to a number of observations concerning the scope of the study. 1/ Some speakers wondered whether a study on the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms should not deal more explicitly with the rights of groups and collectivities, in addition to the right of individuals. In this respect mention was made, inter alia, of peoples and groups who are victimized by environmental degradation and depletion of natural resources. It was also argued that, taking into account the interdependence and indivisibility of all human rights, gross violations of economic, social and cultural rights should not be ignored. Furthermore it was stated that, in addition to systematic racial discrimination, discrimination on other grounds, notably those of religion or belief, should also be included in the concept of gross violations of human rights.

4. The Special Rapporteur has given further consideration to these observations. In this respect he wishes to stress that in giving indications in his preliminary report as to the scope of the concept of gross violations of human rights and fundamental freedoms, he did not intend to be exhaustive and conclusive. Moreover, it was stated in the preliminary report that the study should not deal exclusively with individuals, but that in appropriate cases the entitlement to compensation of collectivities should also be considered. 2/ It cannot be denied that gross violations of human rights, affecting individuals and collectivities, often occur as a result of political oppression, systematic discrimination, maldevelopment, plundering of natural resources, environmental spoliation, illegal occupation and in situations of armed conflict. Policies which cause or allow such phenomena or situations to happen raise issues of responsibility on the part of actors as well as claims for restitution, compensation and rehabilitation by victims. By way of illustration it may be helpful to elaborate this point somewhat further on the basis of a variety of (draft) norms and materials.

5. Land rights, and rights relating to natural resources and the protection of the environment are vital to the life and well-being of indigenous peoples. Existing and emerging international law concerning the rights of indigenous peoples lays special emphasis on the protection of these collective rights and stipulates the entitlement of indigenous peoples to compensation in the case of damages resulting from exploration and exploitation programmes pertaining to their lands, 3/ and in case of relocation of indigenous peoples. 4/ The draft declaration on the rights of indigenous peoples (first revised text) recognizes the right to just and fair compensation for any action or course of conduct which may result in the destruction, deterioration or pollution of their traditional habitat, 5/ as well as for adverse effects resulting from natural resource projects or exploitation of mineral and other subsoil resources. 6/ Equally, the draft declaration recognizes the right to just and fair compensation if an indigenous people is deprived of its means of subsistence. 7/

6. Illegal occupation of a country or territory may constitute another situation causing injuries and damages in matters of human rights and fundamental freedoms and giving rise to claims for compensation. Thus, after its visit to Namibia the Ad Hoc Working Group of Experts on Southern Africa reiterated a number of recommendations it had made previously among them the following recommendation:

> "Since the people of Namibia, during the illegal occupation of their country, have suffered in many forms; since many innocent persons have been tortured and wrongfully convicted and imprisoned, and since private property has been destroyed during the illegal occupation of Namibia, the Group recommends the Commission to adopt a resolution:
>
> (i) requesting an in-depth study of all damage caused during the illegal occupation of Namibia; and
>
> (ii) recommending the setting up of a mechanism for settlement by which the damage occasioned could be compensated in an equitable manner." 8/

There is no evidence that the Commission on Human Rights acted upon this recommendation of its Ad Hoc Group of Experts. In resolution 1990/60 the Commission decided to terminate the mandate of the Working Group on the questions relating to Namibia.

7. As regards environmental damage, which may affect a range of human rights, notably the right to life and the right to a standard of living adequate for health and well-being, it is useful for the purpose of the present study to keep in mind the Declaration of the United Nations Conference on the Human Environment (Stockholm, 1972). Principle 22 reads:

> "States shall cooperate to develop further the international law regarding liability and compensation for the victims of pollution and other environmental damage caused by activities within the jurisdiction or control of such States to areas beyond their jurisdiction."

8. Relevant to the present study is a study prepared by the Secretary-General as regards ensuring the arrest, extradition and punishment of persons responsible for war crimes and crimes against humanity and the exchange of documentation relating thereto. 9/ The study of the Secretary-General includes a special chapter dealing with the question of criteria for determining compensation to the victims of war crimes and crimes against humanity. 10/ The study led to the adoption by the United Nations General Assembly of principles of international cooperation in the detection, arrest, extradition and punishment of persons guilty of war crimes and crimes against humanity, 11/ but this set of principles does not cover the question of determining compensation to the victims. However, for the purpose of discussion on the scope of the present study it is useful to note that the study of the Secretary-General identified, on the basis of information received from Governments, five categories of damages for which compensation is usually paid to victims of war crimes and crimes against humanity. These categories are: (i) loss of life; (ii) personal injury or damage to health; (iii) imprisonment and deportation; (iv) damage as regards employment or occupation; and (v) damage to property. 12/ Certain of the relevant domestic laws require that the damage incurred should be of a certain degree of gravity.

9. At a certain time in the history of the United Nations special attention was given to the plight of survivors of Nazi concentration camps, who had been victims of scientific experiments. This matter was taken up by the Commission on the Status of Women at its fourth session 13/ and led to the adoption by the Economic and Social Council of resolution 353 (XII) of 19 March 1951, in which the Council appealed to the competent German authorities to consider making the fullest possible reparation for the injuries suffered, under the Nazi regime, by persons subjected to so-called scientific experiments in concentration camps. In reply 14/ the Government of the Federal Republic of Germany stated that it was prepared, in special cases of need, to afford practical assistance to the surviving victims of experiments on human beings then living abroad, who were persecuted on grounds of race, religion, opinions or political convictions, and were ineligible for reparation under the compensation laws in force in the Länder of the Federal Republic, whether because they lacked residential qualifications or because the time-limit for submission of applications had expired. Victims of experiments who were ineligible for reparation on other grounds would not be denied assistance if

their health had been permanently impaired through gross disregard of human rights. The Economic and Social Council, in resolution 386 (XIII) of 15 September 1951, welcomed the decision taken by the Government of the Federal Republic of Germany in assuming responsibility for this problem and appealed to that Government to render on the most generous scale possible the assistance it had undertaken to provide.

10. The conduct and the activities of parties in situations of armed conflict causing injuries and damages often give rise to claims for compensation. Thus, the United Nations General Assembly gave support in a series of resolutions under the heading "Remnants of war" to the demand of developing countries affected by the implantation of mines on their lands for compensation for the losses incurred from the States which planted the mines. More recently the Security Council reaffirmed that Iraq is liable under international law for any direct loss, damage, including environmental damage and the depletion of natural resources, or injury to foreign Governments, nationals and corporations, as a result of Iraq's unlawful invasion and occupation of Kuwait; and decided to create a fund to pay compensation for claims that fall within these terms and to establish a Commission for administering the fund. 16/ It should be understood, however, for the purposes of the present study that these references to United Nations pronouncements and United Nations practice in connection with situations of armed conflicts are only relevant to the extent that they pertain, directly or indirectly, to the right to restitution, compensation and rehabilitation of victims of gross violations of human rights and fundamental freedoms.

11. The above illustrations, drawn from United Nations documentation and practice, make it clear that the parameters of the present study are shaped by the notion of serious damages and grave injuries to human dignity, to the physical and moral integrity of the human person and to the very existence of groups, communities and peoples, which result in legitimate claims for restitution, compensation and rehabilitation on the part of those who are victimized. Against this background the Special Rapporteur would dispel any doubts that gross violations of economic, social and cultural rights, as well as systematic practices and policies of religious discrimination and intolerance, may also, in appropriate cases, give rise to just entitlements to compensation on behalf of the victims. At the same time the Special Rapporteur is fully aware that a broadening of the scope of the study may give rise to complex questions in terms of defining rights and responsibilities and eventually in the drawing up of basic principles and guidelines. He feels therefore that he has to approach this matter with a certain degree of prudence.

II. RELEVANT DECISIONS ADOPTED BY THE EIGHTH UNITED NATIONS CONGRESS ON THE PREVENTION OF CRIME AND THE TREATMENT OF OFFENDERS

12. The Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders (Havana, Cuba, 27 August-7 September 1990) 17/ adopted a resolution relevant to the present study inasmuch as it relates to implementation of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. (See preliminary report, concerning the present

study, E/CN.4/Sub.2/1990/10, para. 16). In a resolution entitled "protection of the human rights of victims of crime and abuse of power", 18/ the Congress called upon States to take into account the provisions of the Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power in framing their national legislation and recommended that Governments should consider the availability of public and social support services for victims of crime and abuse of power and foster culturally appropriate programmes for victim assistance, information and compensation. Furthermore, the Congress requested the Secretary-General to make appropriate provisions to study the feasibility of establishing an international fund, within the framework of the United Nations crime prevention and criminal justice programme, for the compensation of, and assistance to, victims of transnational crimes and for the promotion of international research, data collection and dissemination and the establishment of policy guidelines in this respect.

13. In its resolution 45/121, dated 14 December 1990, the United Nations General Assembly welcomed the instruments and resolutions adopted by the Eighth Congress and invited Governments to be guided by them in the formulation of appropriate legislation and policy directives.

III. RELEVANT DECISIONS AND VIEWS OF INTERNATIONAL HUMAN RIGHTS ORGANS

A. The Human Rights Committee

14. Under the Optional Protocol to the International Covenant on Civil and Political Rights the Human Rights Committee may receive and consider communications from individuals who claim to be victims of a violation by a State party of any rights set forth in the Covenant. The decisions of the Human Rights Committee are referred to as "views" in article 5, paragraph 4, of the Optional Protocol. After the Committee has made a finding of a violation of one or more provisions of the Covenant, it usually proceeds to ask the State party to take appropriate steps to remedy the violation. The basis for such remedy is article 2, paragraph 3, of the Covenant, according to which each State party undertakes to ensure that any person whose rights or freedoms as recognized in the Covenant are violated shall have an effective remedy. More specific provisions on compensation are contained in article 9, paragraph 5, of the Covenant, which provides that anyone who has been the victim of unlawful arrest or detention shall have an enforceable right to compensation and in article 14, paragraph 6, which provides for compensation, when a person has suffered punishment as a result of a miscarriage of justice.

15. By the conclusion of its thirty-ninth session (July 1990) the Human Rights Committee had formulated its views under article 5, paragraph 4, of the Optional Protocol with regard to 110 communications. 19/ While the case law of the Human Rights Committee has dealt with the great majority of the provisions of the Covenant, the issue of providing remedies, including compensation, to victims of violations of the Covenant came up most prominently with respect to:

(a) The right to life (art. 6 of the Covenant);

(b) The right not to be subjected to torture or cruel, inhuman or degrading treatment or punishment (art. 7);

(c) The right to liberty and security of person (art. 9), including:

(i) The right not to be subjected to arbitrary arrest and detention (art. 9 (1)),

(ii) The right to be brought promptly before a judge and tried within a reasonable time (art. 9 (3));

(iii) The right to challenge one's arrest and detention (or the remedy of habeas corpus) (art. 9 (4));

(d) The right to be treated humanely during imprisonment (art. 10);

(e) The right to a fair hearing (art. 14), including:

(i) A fair and public hearing by a competent, independent and impartial tribunal (art. 14 (1));

(ii) Minimum guarantees in the determination of any criminal charge, notably the right to communicate with counsel (art. 14 (3) (b));

(iii) The right to legal assistance of one's own choosing (art. 14 (3) (b) and (d));

(iv) The right to be tried without undue delay (art. 14 (3) (c));

(v) The right to examine witnesses (art. 14 (3) (e));

(vi) The right not to incriminate oneself (art. 14 (3) (g));

(vii) The right to review of conviction and sentence (art. 14 (5)). 20/

In most communications where the Human Rights Committee acted under article 5, paragraph 4, of the Optional Protocol, the Committee found, insofar as it concluded that the Covenant was violated, that such violation not only pertained to one of the above-mentioned provisions but to a number of them in conjunction.

16. It is not the purpose of the present study to deal in substance with the provisions of the Covenant and the case law of the Human Rights Committee insofar as the Committee has applied and interpreted the provisions of the Covenant. This study merely seeks to find out how the Committee, when it is of the view that the Covenant has been violated, approaches the question of remedies, including compensation. Without ignoring the views of the Committee with respect to violations of other provisions of the Covenant, the Special Rapporteur feels that a selection of those communications is most instructive for present purposes where the facts mainly disclosed a violation

of article 6 (right to life) and/or article 7 (right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment). As the Human Rights Committee once indicated, these violations are of a special gravity (case No. 194/1985 Jean Miango Muiyo v. Zaire).

17. Right to life

(a) In case No. 30/1978 (Irene Bleier Lewenhoff and Rosa Valiño de Bleier v. Uruguay) it was the Committee's view that articles 7, 9 and 10 (1) of the Covenant had been violated and that there were serious reasons to believe that the ultimate violation of article 6 had been perpetrated by the Uruguayan authorities. As regards the latter point the Committee urged the Government to reconsider its position in this case and to take effective steps (i) to establish what had happened to Eduardo Bleier since October 1975, to bring to justice any persons found to be responsible for his death, disappearance or ill-treatment, and to pay compensation to him or his family for any injury which he had suffered; and (ii) to ensure that similar violations did not occur in the future.

(b) In case No. 45/1979 (Pedro Pablo Camargo v. Colombia) the Committee was of the view that all other violations which might have happened in that case were subsumed under the even more serious violations of article 6. The Committee was accordingly of the view that the State party should take the necessary measures to compensate the husband of the person killed (as a result of the deliberate action of the police) and to ensure that the right to life was duly protected by amending the law.

(c) In case No. 84/1981 (Guillermo Ignacio Dermit Barbato and Hugo Haroldo Dermit Barbato v. Uruguay) the Committee was of the view that, with respect to one person, article 6 had been violated because the authorities had failed to take appropriate measures to protect his life while in custody. With respect to the other person, the Committee held that the facts disclosed violation of articles 9 (3) and (4) and 14 (3) (c). The Committee was accordingly of the view that the State party was under an obligation to take effective steps: (a) to establish the facts of the death, to bring to justice any persons found to be responsible for the death and pay appropriate compensation to the family; (b) with respect to the other person, to ensure strict observance of all the procedural guarantees prescribed by article 14, as well as of the rights of detained persons set forth in articles 7, 9 and 10; (c) to transmit a copy of these views to the person concerned; and (d) to take steps to ensure that similar violations did not occur in the future.

(d) In case No. 107/1981 (Elena Quinteros Almeida and Maria del Carmen Almeida de Quinteros v. Uruguay) the Committee was of the view that the mother of the disappeared daughter had lived under anguish and stress because of the disappearance of her daughter and the continuing uncertainty concerning her fate and whereabouts. The mother had the right to know what had happened to her daughter. In this respect the mother too was a victim of the violations of the Covenant suffered by her daughter, in particular of article 7. As regards the daughter, the Committee concluded that responsibility for her disappearance fell on the authorities of Uruguay and

that, consequently, the Government should take immediate and effective steps: (a) to establish what had happened to the disappeared person since 28 June 1976, and to secure her release; (b) to bring to justice any persons found to be responsible for her disappearance and ill-treatment; (c) to pay compensation for the wrongs suffered; and (d) to ensure that similar violations did not occur in the future.

(e) In case No. 146/1983 and 148-154/1983 (John Khemraadi Baboeram et al. v. Suriname) the Committee was of the view that the victims were arbitrarily deprived of their lives in violation of article 6. The Committee urged the State party to take effective steps: (i) to investigate the killings of December 1982; (ii) to bring to justice any persons found to be responsible for the death of the victims; (iii) to pay compensation to the surviving families; and (iv) to ensure that the right to life was duly protected in Suriname.

(f) In case No. 161/1983 (Joaquin David Herrera Rubio v. Colombia) the Committee concluded that article 6 of the Covenant had been violated because the State party had failed to take appropriate measures to prevent the disappearance and subsequent killings of the parents of the author of the communication and to investigate effectively the responsibility for their murder. Moreover, the Committee held that, with respect to the author of the communication, articles 7 and 10, paragraph 1, had been violated because he had been subjected to torture and ill-treatment during his detention. The Committee was accordingly of the view that the State party was under an obligation, in accordance with the provisions of the Covenant, to take effective measures to remedy the violations that the author had suffered and further to investigate the said violations, to take action thereon as appropriate and to take steps to ensure that similar violations did not occur in the future.

(g) In case No. 194/1985 (Jean Miango Muiyo v. Zaire) the Committee found that the facts disclosed a violation of articles 6 and 7 of the Covenant. The Committee urged the State party to take effective steps: (a) to investiage the circumstances of the death of the victim; (b) to bring to justice any person found to be responsible for his death; and (c) to pay compensation to his family.

(h) In case No. 181/1984 (A. and H. Sanjuán Arévalo v. Colombia) the Committee found that the right to life enshrined in article 6 of the Covenant and the right to liberty and security of the person laid down in article 9 of the Covenant had not been effectively protected by the State party concerned. The Committee stated that it would welcome information on any relevant measures taken by the State party in respect of the Committee's views and, in particular, invited the State party to inform the Committee of further developments in the investigation of the disappearance of the Sanjuán brothers.

18. Right not to be subjected to torture or to cruel, inhuman or degrading treatment or punishment

(a) In case No. 63/1979 (Vileta Setelích v. Uruguay) the Human Rights Committee found violations of articles 7 and 10 (1), 9 (3), 14 (3) (a), 14 (3) (b), 14 (3) (c), 14 (3) (d) and 14 (3) (e) of the Covenant. The

Committee was of the view that the State party was under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant and to provide effective measures to the victim, and in particular to extend to the victim (Raúl Sendic) treatment laid down for detained persons in articles 7 and 10 of the Covenant and to give him a fresh trial with all the procedural guarantees prescribed by article 14 of the Covenant. The State party must also ensure that the victim received promptly all necessary medical care.

(b) In case No. 25/1978 (Carmen Améndola and Graciela Baritussio v. Uruguay) the Committee found in respect of one victim, violations of articles 7 and 10 (1) and article 9 (1) of the Covenant, and with respect to the other victim, violations of article 9 (1) and 9 (4). The Committee was of the opinion that the State party was under an obligation to provide the victims with effective remedies, including compensation, for the violations they had suffered. The State party was also urged to investigate the allegations of torture made against the persons in the case.

(c) In case No. 80/1980 (Elena Beatriz Vasilskis v. Uruguay) the Committee found violations of articles 7 and 10 (1), and of article 14 (1), 14 (3) (b) and (d) and 14 (3) (e) of the Covenant. The Committee was of the view that the State party was under an obligation to take immediate steps: (a) to ensure strict observance of the provisions of the Covenant and to provide effective remedies to the victim, and, in particular, to extend to the victim treatment as laid down for detained persons in article 10 of the Covenant; (b) to ensure that she received all necessary medical care; (c) to transmit a copy of these views to her; (d) to ensure that similar violations did not occur in the future.

(d) In case No. 88/1981 (Gustavo Raúl Larrosa Bequio v. Uruguay) the Committee found violations of the Covenant with respect to the victim, in particular articles 7 and 10 (1). The Committee was of the view that the State party was under an obligation to take immediate steps: (a) to ensure strict observance of the provisions of the Covenant and provide effective remedies to the victim, in particular, to extend to the victim treatment as laid down for detained persons in article 10 of the Covenant; (b) to ensure that he received all necessary medical care; (c) to transmit a copy of these views to him; and (d) to take steps to ensure that similar violations did not occur in the future.

(e) In case No. 110/1981 (Antonio Vianna Acosta v. Uruguay) the Committee concluded that articles 7 and 10 (1), as well as article 14 (3) (b) and (d) and 14 (3) (c) of the Covenant had been violated. The Committee was of the view that the State party was under an obligation to provide the victim with effective remedies and, in particular, with compensation for physical and mental injury and suffering caused to him by the inhuman treatment to which he had been subjected.

(f) In case No. 124/1982 (Tshitenge Muteba v. Zaire) the Committee found violations of articles 7 and 10 (1) and of articles 9 (3), 9 (4), 14 (3) (b), (c) and (d) and 19 of the Covenant. The Committee was of the view that the State party was under an obligation to provide the victim with effective

remedies, including compensation, for the violations which he had suffered, to conduct an inquiry into the circumstances of his torture, to punish those found guilty of torture and to take steps to ensure that similar violations did not occur in the future.

(g) In case No. 176/1984 (Walter Lafuente Peñarrieta et al. v. Bolivia) the Committee concluded that violations of the Covenant had occurred with respect to article 7 and articles 9 (3) and 10 (1) and article 14 (3) (b). The Committee was of the view that the State party was under an obligation, in accordance with the provisions of article 2 of the Covenant, to take effective measures to remedy the violations suffered by the victims, to grant them compensation, to investigate the violations, to take action thereon as appropriate and to take steps that similar violations did not occur in the future.

19. The above review of case law of the Human Rights Committee, involving violations of, particularly, articles 6 and 7 of the Covenant, brings out that there exists a definite link between effective remedies to which the victim(s) is (are) entitled, remedies aimed at the prevention of the recurrence of similar violations and the issue of the follow-up given by the State party concerned with respect to remedies called for in the Committee's view. It is useful to pay somewhat more attention to these three elements.

20. As regards the obligation of States parties to ensure that persons whose rights and freedoms are violated have an effective remedy (article 2, para. 3, of the Covenant), the Committee, in addition to stating its opinion that States parties are under an obligation to take effective measures to remedy violations, has spelled out specific types of remedies that are called for, depending on the nature of violations and the condition of the victim(s). Consequently, the Human Rights Committee has repeatedly expressed the view that the State party is under an obligation:

(i) To investigate the facts.

(ii) To take action thereon as appropriate.

(iii) To bring to justice persons found to be responsible.

(iv) To extend to the victim(s) treatment in accordance with the provisions and the guarantees of the Covenant.

(v) To provide medical care to the victim(s).

(vi) To pay compensation to the victim(s) or to his (her) family.

21. As regards the obligation to pay compensation, the Human Rights Committee has used a variety of formulations:

(i) Compensation to the victim (the disappeared person) or his family for any injury which he has suffered (No. 30/1978).

(ii) Compensation to the husband for the death of his wife (No. 45/1979).

(iii) Appropriate compensation to the family of the person killed (No. 84/1981).

(iv) Compensation for the wrongs suffered (No. 107/1981).

(v) Compensation for physical and mental injury and suffering caused to the victim by the inhuman treatment to which he was subjected (No. 110/1981).

(vi) Compensation to the surviving families (Nos. 146/1983 and 148-154/1983).

In this respect two observations should be made. First, it may be assumed that in the Committee's views the basis for determining the amount or nature of the compensation is not only physical injury or damage but also mental injury or damage. Second, it is not fully clear whether the Committee recognizes, in the case of the death or disappearance of a person, that family members are in their own right entitled to compensation because of their own sufferings and anguish or that family members are entitled to compensation for the injury inflicted upon the immediate victim. At least in one case (No. 107/1981) the Committee ruled that the mother of the disappeared person had herself also been a victim.

> "The Committee understands the anguish and stress caused to the mother by the disappearance of her daughter and by the continuing uncertainty concerning her fate and whereabouts. The author has a right to know what has happened to her daughter. In these respects, she too is a victim of the violations of the Covenant suffered by her daughter, in particular of article 7." (para. 14)

The Committee urged that compensation be paid for the wrongs suffered, presumably for the wrongs suffered by both the disappeared daughter and the mother.

22. The preventive aspect of the remedies is constantly underlined by the Human Rights Committee in its frequent calls upon States parties "to take steps to ensure that similar violations do not occur in the future". Equally, the Committee has repeatedly expressed the view that States parties are under an obligation to take immediate steps to ensure strict observance of the provisions of the Covenant. More particularly with regard to the right to life the Committee urged, by way of preventive action, that the State party concerned ensure the due protection of that right by amending the law (No. 45/1979).

23. After expressing its views under the Optional Protocol to the Covenant, the Human Rights Committee remained in many cases unaware whether States parties were in fact complying with these views. Often the Committee received information or had reasons to assume that States parties had not provided any appropriate remedy as requested by the Committee. The Committee has taken certain steps to cope with this unsatisfactory state of affairs. One particular State party which initially ignored the views of the Committee was repeatedly requested by the Committee to transmit a copy of its views to the

victim(s) concerned. More recently the Committee has been attempting to develop a dialogue with States parties concerned, with a view to encouraging the implementation of remedial measures. For example, the Committee stated in a particular case (No. 181/1984) that it would welcome information on any relevant measures introduced by the State party in respect of the Committee's views and, in particular, invited the State party to inform the Committee of further developments in the investigation of the disappearance of the victims. In order more systematically to follow developments or the lack thereof with respect to the implementation of remedial measures after the Committeee has issued its views, the Committee decided on 24 July 1990 to appoint a special rapporteur for the follow-up of views. 21/ One of the duties of the Special Rapporteur is to recommend to the Committee, action upon all letters of complaint received from individuals held, in the views of the Committee under the Optional Protocol, to have been victims of a violation, and who claim that no appropriate remedy has been provided. This issue of follow-up monitoring is not only essential for the sake of rendering remedial justice to victims and for upholding the authority of an important human rights body such as the Human Rights Committee, it is also an important element to be kept in mind in the broader framework of the study concerning the right to restitution, compensation and rehabilitation for victims of gross violations of human rights and fundamental freedoms.

B. The Committee on the Elimination of Racial Discrimination

24. Under article 14 of the International Convention on the Elimination of All Forms of Racial Discrimination, individuals or groups of individuals who claim that any of their rights enumerated in the Convention have been violated by a State party, and who have exhausted all available domestic remedies, may submit written communciations to the Committee on the Elimination of Racial Discrimination for its consideration. As of 31 December 1990, only 14 of the 130 States that have ratified or acceded to the Convention have declared that they recognize the competence of the Committee to receive and consider communications under article 14 of the Convention. The Committee has as yet dealt with only a few communications. Of relevance from the point of view of providing remedial relief is case No. 1/1984 (Yilmaz-Doğan v. the Netherlands), in which the Committee, acting under article 14, paragraph 7, of the Convention, concluded that the petitioner had not been afforded protection as regards equality before the law in respect of her right to work (article 5 (e) (1) of the Convention). The Committee suggested that the State party take this into account and recommended that it ascertain whether the petitioner was in the meantime gainfully employed and, if not, that it use its good offices to secure alternative employment for her and/or to provide her with such other relief as might be considered equitable.

C. The Committee against Torture

25. Under article 22 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, individuals who claim that any of their rights enumerated in the Convention have been violated by a State party and who have exhausted all available domestic remedies may submit written communications to the Committee against Torture for its consideration. As of 31 December 1990, 26 out of 55 States parties have

declared that they recognize the competence of the Committee to receive and consider communcations under article 22 of the Convention. In cases Nos. 1/1988, 2/1988, 3/1988 (O.R., H.M. and M.S. v. Argentina) the petitioners, relatives of three deceased victims of torture, challenged the "Due Obedience Act" and the "Punto Final" as being incompatible with the State party's obligations under the Convention. The Committee declared the communications inadmissible ratione temporis inasmuch as the Convention could not be applied retroactively.

26. However, in a remarkable obiter dictum which is most relevant to the subject matter of the present study, the Committee observed that the laws in question were incompatible with the spirit and purpose of the Convention. The Committee urged the State party not to leave the victims of torture and their dependants without a remedy. The Committee felt that if civil action for compensation was no longer possible because the period of limitations for lodging such action had run out, it would welcome, in the spirit of article 14 of the Convention (dealing with the enforceable right to fair and adequate compensation), the adoption of appropriate measures to enable adequate compensation. The Committee indicated that it would welcome receiving from the State party detailed information concerning the number of successful claims for compensation for victims of acts of torture during the "dirty war" or for their dependants, including the criteria for eligibility for such compensation. Soon after the Committee had formulated its views it received a substantive reply from the Government of Argentina. 22/

27. Two aspects should be highlighted with respect to the above-mentioned cases. First, in spite of the fact that the Committee against Torture declared the communications inadmissible ratione temporis, the Committee, very mindful of the important principles involved in the cases in question, chose to make known its strong views on the substance and to impress upon the Government concerned the need to take remedial action, including the provision of adequate compensation. Second, following the policy and the practice of the Human Rights Committee, the Committee against Torture made itself available to enter into a dialogue with the Government concerned on questions relating to redress and remedies for the victims and their relatives.

D. The Inter-American Court of Human Rights

28. The Inter-American Court has been seized with a number of cases involving disappearances attributed to the armed and security forces in Honduras. 23/ The Court reached decisions in the Velásques Rodríguez case, 24/ the Godinez Cruz case, 25/ and the Fairén Garbi and Solis Corrales case. 26/ In view of the similarity of these cases, reference will only be made to the Velásquez case, for practical purposes. Given the nature of this progress report, three aspects will be singled out as deserving special attention. First, the obligation to pay compensation in relation to the obligation to prevent, to investigate and to punish. Second, the establishment of compensatory damages. Third, the issue of follow-up and monitoring.

29. It should be noted that the Inter-American Court interprets the obligation contained in article 1 of the American Convention on Human Rights to the effect that States parties undertake to ensure to all persons subject

to their jurisdiction the free and full exercise of the rights and freedoms recognized in the Convention, in a comprehensive manner. The Court stated that:

> "As a consequence of this obligation, the States must prevent, investigate and punish any violations of the rights recognized by the Convention and, moreover, if possible attempt to restore the right violated and provide compensation as warranted for damages resulting from the violations." 27/

In the same vein the Court ruled:

> "The State has a legal duty to take reasonable steps to prevent human rights violations and to use the means at its disposal to carry out a serious investigation of violations committed within its jurisdiction, to identify those responsible, to impose the appropriate punishment and to ensure the victim compensation." 28/

In the Court's approach, which is very similar to the approach of the Human Rights Committee, as discussed above, the obligation to prevent and the obligation to restore are closely interlinked. Moreover, it is celar that the preventive approach should receive due priority and emphasis because one ounce of prevention is more effective than a pound of cure. It is also worth noting that among the means of redress the Court mentions in a subsequent order are the investigation of the violations committed, the punishment of the guilty and the provision of adequate compensation. In other words, redress means that full justice should be done vis-à-vis society as a whole, the persons responsible and the victims. Compensatory measures form part of a policy of justice.

30. In its judgement of 29 July 1988 the Inter-American Court decided, taking into account article 63 (1) of the American Convention, that the State party concerned was required to pay fair compensation to the next-of-kin of the victim and that the form and amount of such compensation, failing agreement within six months of the date of the judgement, was to be settleed by the Court and that, for that purpose, the Court retained jurisdiction of the case. Consequently, the Court became again seized with the matter and on 21 July 1989 delivered a judgement on compensatory damages in the Velásques Rodriguez case. 29/ In this judgement the Court defined the scope and content of the just compensation to be paid to the family of the disappeared person.

31. The Court made it clear that as a principle of international law every violation of an international obligation which results in harm creates a duty to make adequate reparation. In this respect the Court ruled that reparation "consists in full restitution (restitutio in integrum), which includes the restoration of the prior situation, the reparation of the consequences of the violation, and indemnification for patrimonial and non-patrimonial damages, including emotional harm". 30/ As to emotional harm, the Court held that indemnity be awarded under international law (i.e. the American Convention on Human Rights) and that indeminification must be based upon principles of equity. In this context the Court referred to the applicable provision of the

American Convention (article 63 (1)), which according to the Court "is not limited by the defects, imperfections or deficiencies of national law, but functions independently of it". 31/

32. As regards the scope of the reparation the Court observed that such measures as investigation into the facts, the punishment of those responsible, a public statement condemning the practice of involuntary disappearances and in fact the judgement of the Court itself on the merits constituted a part of reparation and moral satisfaction of significance and importance for the families of the victims. On the other hand, contrary to what had been requested by the lawyers of the victims, the Court held that punitive damages were not included in the expression "fair compensation", used in article 61 (1) of the American Convention. This expression referred, according to the Court, to a part of the reparation and to the "injured party" and is therefore compensatory and not punitive. As a result, the Court concluded that fair compensation included reparation to the family of the victim of the material and moral damages they suffered because of the involuntary disappearance of the victim. 32/ It should further be noted that the Court also gave ample consideration to the question of moral damages and found that the disappearance of the victim produced harmful psychological impacts among his immediate family which should be indemnified as moral damages. 33/

33. Finally, as regards the monitoring of follow-up action, which was discussed earlier in connection with the views of the Human Rights Committee under the Optional Protocol (see paras. 19 and 23 above) it is obvious that the same arguments underlining the need for follow-up supervision apply a fortiori to binding judgements of the Court. It should therefore be duly noted that the Inter-American Court in its Velásquez Compensation Judgement decided in the final sentence of the award that it should supervise the indemnification ordered and should close the file only when the compensation had been paid.

Notes

1/ E/CN.4/Sub.2/1990/SR.31 and 32.

2/ E/CN.4/Sub.2/1990/10, para. 37.

3/ ILO Convention 169 concerning Indigenous and Tribal Peoples in Independent Countries, article 15, para. 2 (fair compensation).

4/ Ibid., article 16, paras. 4 and 5 (full compensation).

5/ E/CN.4/Sub.2/1990/39, draft article 16.

6/ Ibid., draft article 17.

7/ Ibid., draft article 8.

8/ E/CN.4/1990/7/Add.1, para. 46 (g).

9/ E/CN.4/983.

10/ Ibid., chapter XI.

11/ General Assembly resolution 3074 (XXVIII) of 3 December 1973.

12/ E/CN.4/983, paras. 442-468.

13/ E/1712, paras. 77-79.

14/ Letter dated 30 July 1951 in E/2087, Annex H. It should be noted that no reply was found from the authorities of the then German Democratic Republic.

15/ General Assembly resolutions 35/71, 36/188, 37/215, 38/162, 39/167, 40/197.

16/ Security Council resolution 687 (1991), paras. 16 and 18.

17/ Report of the Congress, A/CONF.144/28.

18/ Resolution 27 of "Other resolutions adopted by the Congress".

19/ Report of the Human Rights Committee to the General Assembly at its forty-fifth session, A/45/40, vol. I, para. 589.

20/ Other substantive provisions of the Covenant which were the subject of case laws of considerable interest are, inter alia, the right to engage in political activity (art. 25), equality before the law, the principle of non-discrimination (art. 26) and the rights of minorities (art. 27).

21/ Report of the Human Rights Committee to the forty-fifth session of the General Assembly, A/45/40, vol. II, Annex XI.

22/ Report of the Committee against Torture to the General Assembly at its forty-fifth session, A/45/44, Annex VI.

23/ See Juan E. Mendez and José Miguel Vivanco, "Disappearances and the Inter-American Court: Reflections on a litigation experience", in Hamline Law Review, vol. 13 (1990) pp. 507-577.

24/ Judgement, Inter-American Court of Human Rights, Series C. No. 4 (1988).

25/ Judgement, Inter-American Court of Human Rights, Series C. No. 5 (1989).

26/ Judgement, Inter-American Court of Human Rights, Series C. No. 6 (1989).

27/ Judgement, note 24, para. 166.

28/ Ibid., para. 174.

29/ Judgement, Inter-American Court of Human Rights, Series C. No. 7 (1989).

30/ Velásquez Compensation Judgement, para. 26.

31/ Ibid., para. 30.

32/ Ibid., paras. 32-39.

33/ Ibid., para. 51.